

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MOSHE SHARFI</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,011,003
<b>DAVE'S ELECTRONICS, INC.</b>	)	
Respondent (uninsured)	)	

**ORDER**

Claimant appeals from an Award entered by Administrative Law Judge Kenneth J. Hursh on November 1, 2004. Oral arguments were presented to the Appeals Board (Board) on May 10, 2005.

**APPEARANCES**

James M. Sheeley of Kansas City, Kansas, appeared for the claimant. Steven J. Quinn of Kansas City, Missouri, appeared for the respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopts the stipulations that are listed in the Award.

**ISSUES**

The ALJ found that claimant suffered a work-related slip and fall on or about January 2, 2003. However, the ALJ further found that claimant failed to prove that he suffered personal injury to either shoulder as a result of that accident. Accordingly, claimant was not awarded temporary total nor permanent partial disability compensation. Claimant contends he permanently injured both his shoulders and, therefore, is entitled to an award for a general body disability and permanent partial disability compensation based upon a work disability. Claimant also seeks temporary total disability compensation for the period of time that he was off work recovering from his March 24, 2003 left shoulder surgery. Finally, claimant states that he "had no objection to the admission of certain

medical records but made no other stipulations as to those medical records” and, therefore, “[t]he records are not competent evidence . . . .”<sup>1</sup>

Conversely, respondent contends the Board should find that there was no work-related accident, but otherwise the ALJ’s award should be affirmed.

The nature and extent of claimant’s disability, specifically whether he suffered injury, including a permanent impairment of function to either or both shoulders and, if so, his entitlement to temporary total and permanent partial disability compensation are the only issues for the Board’s review.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The ALJ found claimant was not a credible witness and had failed to prove that he was entitled to any temporary total or permanent partial general disability compensation for his work-related accident. The Board finds that the ALJ’s award should be affirmed. The Board agrees with the analysis of the evidence and law as set forth in the Award and adopts the ALJ’s findings, conclusions and orders as it own.

In his submission letter to the ALJ dated October 28, 2004, claimant specifically included as “Evidence To Be Considered” the “Regular Hearing, dated July 8, 2004, before ALJ Kenneth Hursh, containing Exhibit 1, KU medical statements, and Exhibit 2, records of Dr[.] Toby, the treating physician.”<sup>2</sup> And although claimant mentions in that submission letter that the medical records of Ted Williams, M.D., are not supported by any testimony of Dr. Williams, there is no objection made to the admissibility of those or any of the other records respondent offered. It is only on appeal to the Board that claimant objects to the fact-finder considering those records. Claimant cannot sit on his hands and allow the introduction of exhibits without objection and then object for the first time on appeal.<sup>3</sup> The Board denies claimant’s belated objection.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that

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<sup>1</sup> Claimant’s Review Brief (filed Dec. 21, 2004).

<sup>2</sup> Claimant’s Submission Letter (filed Oct. 29, 2004).

<sup>3</sup> *Boomis v. U.S.D. #446*, No. 86,765 (Kansas Court of Appeals unpublished opinion filed Sept. 28, 2001); *Eisele v. Little Caesars Kansas City, Inc.*, No. 84,975 (Kansas Court of Appeals unpublished opinion filed Oct. 27, 2000).

right depends.<sup>4</sup> “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”<sup>5</sup>

Claimant had preexisting problems in both his shoulders for which he had received extensive prior medical treatment. Nevertheless, it is well settled in this State that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.<sup>6</sup> “The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.”<sup>7</sup>

The Board finds claimant has failed to prove that it is more probably true than not true that his slip-and-fall accident at work aggravated and accelerated his bilateral upper extremity and bilateral shoulder conditions. Accordingly, claimant has not met his burden of proving that he has suffered injuries that arose out of and in the course of his employment with respondent.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated November 1, 2004, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

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<sup>4</sup> K.S.A. 44-501(a); *See also Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993); *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P. 2d 871 (1984).

<sup>5</sup> K.S.A. 2002 Supp. 44-508(g); *See also In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>6</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

<sup>7</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

Dated this \_\_\_\_ day of May 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James M. Sheeley, Attorney for Claimant  
Steven J. Quinn, Attorney for Respondent  
Kenneth J. Hursh, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director